

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAY P. WAGNER

Claimant

VS.

CLEMENSEN COMPANY, INC.

Respondent

AND

TRAVELERS INSURANCE COMPANY

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 166,486

ORDER

ON the 10th day of March, 1994, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey, dated January 26, 1994, and an Award Nunc Pro Tunc dated January 28, 1994, came on for oral argument.

APPEARANCES

The claimant appeared by and through his attorney, Kenneth M. Stevens of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, William L. Townsley, III of Wichita, Kansas. The Kansas Workers Compensation Fund, having been dismissed as a party to this action, appeared not. There were no other appearances.

RECORD

The record considered by the Appeals Board for purposes of this review is the same as that set forth in the Award of the Special Administrative Law Judge and the Appeals Board adopts that specification of the record as if fully set forth herein.

STIPULATIONS

For purposes of this appeal, the Appeals Board adopts the stipulations listed in the Award of the Special Administrative Law Judge with the additional stipulation that the claimant's average weekly wage at the time of his injury was \$345.75 as found by the Special Administrative Law Judge in his Award.

ISSUES

- (1) The nature and extent of claimant's disability, if any.
- (2) Whether certain medical expenses should be paid as authorized treatment expenses.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant, at the time of his Regular Hearing testimony in March 1993, was a twenty-nine (29) year old man with a tenth (10th) grade education and a G.E.D. Since being released by Dr. Lesko, he has worked for a commercial industrial contractor as a yardman delivering supplies to the construction sites. In addition to driving a pickup truck, this job includes operating a backhoe, skid loader and forklift. He delivers lumber, nails, and masonry products including cement bags. However, he gets assistance loading and unloading heavy objects. Except for one (1) year's service in the Army as a radio repair specialist, claimant has always worked in heavy manual labor, primarily roughnecking in oil fields and doing construction work. At the time of his injury on March 24, 1991, he was working for respondent installing insulation in the roofs of metal buildings. He was injured when he fell between two (2) purlins, catching himself with his arms but dislocating his right shoulder. He had dislocated his right shoulder twice before, first at age seventeen (17) when he was involved in a motorcycle accident. He testified that after that his arm would pop most of the time when he moved it and it was uncomfortable. He dislocated his right shoulder a second time as a result of a slip and fall in 1987 or 1988. He thereafter continued to experience discomfort in his right shoulder, although he did not have any problem performing his job duties for respondent prior to his subject injury.

Following his injury in March 1991, he was treated at the emergency room of Ozark General Hospital where he was given a closed reduction under anesthetic. Upon his return to Wichita, he went on his own to a Dr. Poling. He was told that he could return to work and do anything he could with one arm. However, claimant did not return to work but instead consulted an attorney who referred him to Dr. Lesko.

Paul Lesko, M.D., is a board-certified orthopedic surgeon in Wichita, Kansas. He first saw claimant on April 8, 1991. His diagnosis was of a recurrent right shoulder dislocation. He performed surgery on the shoulder on April 22, 1991. Thereafter, during an office visit on May 24th, Dr. Lesko prescribed physical therapy. However, when claimant returned to Dr. Lesko for an office visit a month later he indicated that he had only been to therapy twice which was less than prescribed. Dr. Lesko instructed claimant to see the physical therapist at least three to four (3-4) times a week. It appears that claimant thereafter attended physical therapy as prescribed. He last saw Dr. Lesko on November 26th at which time his examination showed claimant had regained essentially a full range of motion with good strength, no positional weakness and very little impairment. He felt a rating of two to three percent (2-3%) impairment of the body as a whole was appropriate for the slight loss of motion with a good return of strength. Dr. Lesko did not feel that claimant needed any permanent work restrictions.

Claimant was evaluated on November 5, 1992, by Dr. Wilton Anderson, an osteopathic physician, board-certified in family practice. He obtained a history of two spontaneous shoulder dislocations with a third dislocation occurring on the job while insulating a roof on March 24, 1991. Claimant complained of a lot of problems with his shoulder with day-to-day use of the right arm and with difficulty sleeping at night if he turned on his right side. Upon physical examination he found claimant to have a restriction on flexion, extension, adduction and abduction. The right humerus appeared fixed at about fifteen (15) degrees in internal rotation. He assessed a two percent (2%) impairment for limitation of internal rotation of the right humerus, one percent (1%) impairment on the external rotation, two percent (2%) impairment on adduction and twelve percent (12%) on abduction for a total functional impairment of seventeen percent (17%) to the body as a whole. He testified that if he were the treating physician he would advise claimant not to do any overhead work and would impose a weight limitation between five to ten (5-10) pounds on the right side with a further recommendation to avoid any repetitive overhead lifting somewhere in the neighborhood of five (5) pounds. Although the history Dr. Anderson obtained from claimant included two (2) spontaneous dislocations of the right shoulder, he was not asked about whether he would have imposed any restrictions prior to the traumatic dislocation which is the subject of this claim. In Dr. Anderson's opinion, claimant probably had a congenital laxity of the ligaments in the musculature of the shoulder. In other words, he was born with an unstable shoulder. This history of two prior (2) spontaneous dislocations differs from the history given Dr. Lesko and the claimant's own testimony that the prior dislocations were traumatic and not spontaneous.

Mr. Jerry Hardin testified on behalf of the claimant as a vocational expert offering his opinions on work disability. Utilizing the restrictions recommended by Dr. Anderson, Mr. Hardin opined that claimant's ability to perform work in the open labor market had been reduced by eighty-five to ninety-five percent (85-95%) due to the injury claimant sustained at work. For purposes of that opinion, he assumed that claimant had the ability to perform, and actually did perform, work in all strength categories including very heavy work pre-injury and that post-injury claimant was limited to performing work in the sedentary category. Sedentary work he defined as exerting up to ten (10) pounds of force occasionally and a negligible amount of force frequently and continuously.

Mr. Hardin also offered an opinion as to claimant's loss of ability to earn a wage in the open labor market as being thirty percent (30%). He arrived at this figure by assuming a pre-injury wage of \$10.00 per hour and a forty (40) hour work week, which is \$400.00 per week, and a post-injury actual wage of \$7.00 per hour for forty (40) hours per week which is \$280.00 per week. This represents a loss of \$120.00 per week which, according to Mr. Hardin, represents a thirty (30) percent loss of wage. The Special Administrative Law Judge, in his Award of January 26, 1994, found claimant to have an average weekly wage of \$345.75. This finding was not disputed by either claimant or respondent on appeal. The evidence shows claimant was actually earning \$6.50 per hour at the time of his regular hearing testimony with about eight (8) hours per month overtime.

Mr. Hardin testified that he would not impose any loss of claimant's ability to perform work in the open labor market and to earn comparable wages based upon the opinion by Dr. Lesko of no permanent work restrictions.

Based upon a review of the entire record, the Appeals Board finds that claimant has suffered a ten percent (10%) permanent partial general body disability. The Appeals Board does not agree with respondent that claimant has returned to work at a comparable wage

such that the presumption of no work disability contained in K.S.A. 44-510e applies. Although claimant's current base wage equals or exceeds that which he received while working for respondent, his overtime work is substantially less such that he is not earning a wage comparable to his average weekly wage that he was earning at the time of his injury. Nevertheless, on the question of permanent restrictions the Appeals Board finds the testimony of Dr. Lesko to be more credible and persuasive than that of Dr. Anderson such that work disability would not be appropriate in this instance. Dr. Lesko was the treating surgeon who had an opportunity to closely follow claimant's condition and recovery over an extended period of time as opposed to Dr. Anderson who saw claimant on only one (1) occasion. Dr. Lesko is a board-certified orthopedic surgeon which is a specialty dealing with the specific type of injury suffered by claimant. Whereas Dr. Anderson is board-certified in family practice and freely admitted that he not only routinely refers patients to orthopedic surgeons but that he also defers to their judgment concerning surgical matters. Furthermore, Dr. Lesko was selected in this instance by claimant. Dr. Anderson testified that although independent medical examinations make up less than five percent (5%) of his practice, he has performed them only for claimants or claimants' attorneys. He has never performed an evaluation for an insurance company, respondent attorney, or employer. In addition, the history Dr. Anderson obtained of two (2) prior spontaneous shoulder dislocations was obviously in error and could easily have affected his opinion concerning the severity of claimant's condition and the need for permanent restrictions. It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 785-786, 817 P.2d 212, rev. denied 249 Kan. 778 (1991). Although the Appeals Board believes the seventeen percent (17%) functional impairment rating opinion given by Dr. Anderson is too high for the injury claimant suffered in this case, the Appeals Board also believes the two to three percent (2-3%) rating opinion given by Dr. Lesko to be too low. The appropriate percentage of impairment falls somewhere in between these two ratings. Accordingly, the Appeals Board finds claimant's permanent partial disability to be ten percent (10%) of the body as a whole.

Claimant raises the issue of whether certain medical expenses should be paid as authorized treatment expenses. Specifically, claimant argues that the charges for services claimant received from Dr. Mary Lynch in the amount of \$181.00 should be paid as authorized treatment and not as unauthorized medical expense. It is alleged that claimant was released by Dr. Lesko without satisfactory results from the surgery and for this reason claimant sought the services of Dr. Lynch on his own. While it does appear that the services provided by Dr. Lynch were for treatment and not for evaluation and rating unlike with Dr. Anderson, it does not appear that claimant either sought first to return to Dr. Lesko or that he requested a change of authorized physician either from the respondent or the Court. It is claimant's contention that he was free to obtain a physician of his own choosing since he had been released by Dr. Lesko from further care. It should be noted that claimant initially selected Dr. Lesko and went to him on his own. This treatment was paid by respondent as authorized treatment. As the deposition of Dr. Lynch was not taken, we have only claimant's testimony concerning the nature of her treatment, the reasonableness and the necessity for such treatment. The Appeals Board is not persuaded that such treatment was reasonable and necessary in light of the testimony by Dr. Lesko. The charges for the services of Dr. Lynch are therefore unauthorized medical expenses and are subject to the \$350.00 limitation together with the charge for the independent medical examination by Dr. Anderson.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated January 26, 1994, is modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN FAVOR OF the claimant, Jay P. Wagner, and against the respondent, Clemensen Company, Inc., and their insurance carrier, Travelers Insurance Company, for an accidental injury which occurred on March 24, 1991, based on an average weekly wage of \$345.75, for 28 weeks of temporary total disability compensation at the rate of \$230.51 per week in the sum of \$6,454.28 and 387 weeks of compensation at the rate of \$23.05 in the sum of \$8,920.35, for a 10% permanent partial general body work disability, making a total award of \$15,374.63.

As of November 10, 1994, there is due and owing claimant \$6,454.28 in temporary total compensation and 161.71 weeks of permanent partial compensation at the rate of \$23.05 per week in the sum of \$3,727.42, making a total of \$10,181.70 to be paid in one lump sum less any amounts previously paid. The remaining \$5,192.93 is to be paid for 225.29 weeks at the rate of \$23.05 per week until fully paid or further order of the Director.

Future medical is approved only upon proper application to the Director.

Claimant's contract of employment with his counsel is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are assessed to the respondent to be paid direct as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Deposition Services Transcript of regular hearing	\$312.80
Barber & Associates Transcript of motion hearing	\$63.90
Don K. Smith & Associates Deposition of Wilton R. Anderson, D.O. Deposition of Jerry D. Hardin	\$223.00 \$372.50
Satterfield Reporting Services Deposition of Paul Lesko, M.D.	\$93.00

IT IS SO ORDERED.

Dated this ____ day of November, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kenneth M. Stevens, 1919 Amidon, Suite 212, Wichita, KS 67203
William L. Townsley, III, 125 N. Market, Suite 1600, Wichita, KS 67202
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director